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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Respondent,

No. CR S-04-288 LKK KJM P

12 vs.

13 JOSEPH FERRARI,

14 Movant.

FINDINGS AND RECOMMENDATIONS

15 _____/
16 Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set
17 aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On August 16, 2008, respondent
18 filed a motion to dismiss; movant did not file an opposition to this motion.

19 On November 25, 2008, movant was ordered to file an opposition within thirty
20 days and advised that the failure to do so could be the basis for an order recommending that the
21 action be dismissed. Fed. R. Civ. P. 41(b). When movant did not respond, the court
22 recommended that his motion to vacate be dismissed for lack of prosecution. Docket No. 72.
23 On January 27, 2009, movant objected to this recommendation, asserting that he had never
24 received a copy of the motion to dismiss. On February 11, 2009, the court directed the
25 government to serve another copy of the motion on movant at FCI Safford and gave movant
26 forty-five days from the date of the order in which to file his opposition. The government

1 effected service the same day. Docket No. 75. The forty-five day period has passed yet
2 petitioner has not filed an opposition or statement of non-opposition or sought additional time in
3 which to respond.

4 Local Rule 78-230(m) requires that opposition to motions filed in prisoner cases
5 be filed within twenty-one days and further provides: "Failure of the responding party to file
6 written opposition or to file a statement of no opposition may be deemed a waiver of any
7 opposition to the granting of the motion" Moreover, in the order of November 25, 2008
8 and the ultimately vacated findings and recommendations of January 16, 2009, movant was put
9 on notice that failure to oppose or otherwise respond to the motion to dismiss would result in a
10 recommendation that his motion to vacate his sentence be dismissed for failure to prosecute.

11 Accordingly, IT IS HEREBY RECOMMENDED that:

12 1. The motion to vacate sentence (docket no. 64) be dismissed for failure to
13 prosecute; and

14 2. The Clerk of the Court be directed to close Civ. No. 08-728 LKK KJM P.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served and filed within ten days after service of the objections. The parties are advised
21 that failure to file objections within the specified time may waive the right to appeal the District
22 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: May 1, 2009.

24 2/ ferr0288.46f&r(2)

25 
26 U.S. MAGISTRATE JUDGE